Filed 8/24/16 In re Destiny S. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re DESTINY S., a Person Coming Under the Juvenile Court Law.	B269272 (Los Angeles County Super. Ct. No. DK04595)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DESIREE Q., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Terry T. Truong, Commissioner Presiding. Remanded.

M. Elizabeth Handy, for Appellant and Defendant.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Desiree Q. (mother) appeals from an order terminating her parental rights over her child, Destiny S. She contends the juvenile court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). We agree and hold that the information provided to the court was sufficient to trigger ICWA's notice requirements. The case is remanded for the limited purpose of ensuring compliance with the ICWA's notice requirements. We need not reverse the termination of mother's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Destiny S. (child) was taken into custody on April 11, 2016, after she was found homeless under a freeway bridge with mother. Mother reported that she was begging for money on the freeway bridge while father was searching the bushes for aluminum cans. The juvenile court subsequently sustained a Welfare and Institutions Code section 300[1] petition filed by the Los Angeles Department of Children and Family Services (the Department) alleging child endangerment, ongoing domestic violence, substance abuse by father, and mental health issues on the part of mother. Several months later, it sustained a section 300 petition on behalf of the child's newborn brother, Devon S. (brother).

At the initial detention hearing on April 16, 2014, father informed the court that he "may have American[ ]Indian ancestry." He did not know the name of the tribe, but indicated his aunt would have that information. The court ordered father to give the Department the names of any relatives who might have information about his American Indian heritage, and deferred making an ICWA finding.

On April 30, 2014, father told a dependency investigator that his sister Yolanda was looking into his American Indian ancestry and would provide additional information

[1] Hereinafter, all statutory references will be to the Welfare and Institutions Code, unless noted otherwise.

once she finds it. The investigator asked for Yolanda's contact information, but father said he would speak with Yolanda and have her contact the investigator if and when she had more information. On June 20, 2014, father told the social worker that his relative was "on the way" to bring paperwork regarding his American Indian heritage. On July 8, 2014, the social worker reported that she had not heard from father since then, and that father had provided no additional information regarding his American Indian ancestry.

At the July 8, 2014 review hearing, counsel for the Department informed the court that the Department had made efforts to follow up with father about his American Indian heritage and father indicated he had documentation, but had not provided it. The court wanted to know what else needed to be done, saying, "I hate to see this come in a year down the line and have to vacate all of these dispositional findings." Counsel for the Department responded, "I don't know that there's anything else the Department can do, Your Honor." Father interjected and informed the court: "My grandmother recently passed. And there was a dispute over some of her property because she had antiques and stuff. My auntie put everything in storage, and she said that -- she's going through storage and she has to find the paperwork. But she says that we do have American Indian heritage. She says there is Black Foot Indian in our family. I don't know, I haven't saw [sic] the paperwork yet, but she says she has it. [¶] And I have been calling her pretty much at least four times a week to find out if she needs me to come up and help her clean out the storage to find the paperwork. She does understand the importance." The court directed father to provide the Department with the aunt's contact information, and stated: "If the Department does not get the cooperation from this relative, the court will find the Department has done all it can to determine whether this is an ICWA case."

In a report filed in advance of an August 19, 2014 review hearing, the Department reported that on July 9, 2014, father had stated that his sister was "on her way" to bring him the document regarding his American Indian heritage. However, father never provided the Department with the document. At the review hearing, the court said: "I don't know what else the Department can do. They have been making steady inquires of everybody and not getting enough to identify anyone to notice [¶] . . . [¶] The court finds

. . . the Department has exhausted efforts to ascertain whether [ICWA] is -- the court will find no reason to find that [ICWA] applies."

A February 23, 2015 report prepared for brother's jurisdiction/disposition hearing indicates that father said, on February 3, 2015, that he believes he may have American Indian ancestry because of where his grandmother was born and raised, and because family members speak about being "mixed with Indian." His grandmother was born and raised in Nachez, Mississippi. Father gave the dependency investigator his sister's name and phone number for additional information. The investigator left messages for the parental aunt on February 4 and 5, 2015, but had not heard back as of February 23, 2015.

At brother's February 23, 2015 jurisdiction/disposition hearing, the court found no reason to know that ICWA applied, but ordered the parents to keep the Department and the court informed of any additional, relevant information. It also ordered the social worker to continue to make efforts to contact the parental aunt about father's American Indian heritage.

On October 29, 2015, the juvenile court held a hearing pursuant to section 366.26 and terminated mother and father's parental rights. It found that it had no reason to know that the child is an "Indian child" under ICWA and therefore "does not order the Department to notice any tribe or the [BIA]"[2]

Mother filed a notice of appeal on December 22, 2015. Father is not a party to the appeal.

DISCUSSION

The ICWA "protect[s] the best interests of Indian children and [ ] promote[s] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . . " (25 U.S.C. § 1902.) " 'Indian child' means any

[2] BIA is an acronym for Bureau of Indian Affairs.

unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe . . . . " (25 U.S.C. § 1903(4).)

"When a court 'knows or has reason to know that an Indian child is involved' in a juvenile dependency proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its right to intervene. [Citations.] Alternatively, if there is insufficient reason to believe a child is an Indian child, notice need not be given. [Citations.]" (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538 (*Shane G.*).)

"[O]ne of the primary purposes of giving notice to the tribe is to enable the tribe to determine whether the child involved in the proceedings is an Indian child. [Citation.]" (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 470 (*Desiree F.*).) "The Indian status of the child need not be certain to invoke the notice requirement. [Citation.] Because the question of membership rests with each Indian tribe, when the juvenile court knows or has reason to believe the child may be an Indian child, notice must be given to the particular tribe in question or the Secretary [of the Interior]. [Citations.]" (*Id.* at p. 471.)

" 'The circumstances that may provide probable cause for the court to believe the child is an Indian child include, but are not limited to, the following: [¶] (A) A person having an interest in the child . . . informs the court or the county welfare agency . . . or provides information suggesting that the child is an Indian child; [¶] (B) The residence of the child, the child's parents, or an Indian custodian is in a predominantly Indian community; or [¶] (C) The child or the child's family has received services or benefits from a tribe or services that are available to Indians from tribes or the federal government, such as the Indian Health Service.' [Citations.] If these or other circumstances indicate a child may be an Indian child, the social worker must further inquire regarding the child's possible Indian status. Further inquiry includes interviewing the parents, Indian custodian, extended family members or any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. (§ 224.3, subd. (c).) If the inquiry leads the social worker or the court to know

or have reason to know an Indian child is involved, the social worker must provide notice. (§§ 224.3, subd. (d), 224.2, subd. (a)(5)(A)-(G).)" (*Shane G.*, *supra*, 166 Cal.App.4th at pp. 1538–1539.) "To maintain stability in placements of children in juvenile proceedings, it is preferable to err on the side of giving notice and examining thoroughly whether the juvenile is an Indian child. [Citations]." (*In re Isaiah W.* (2016) 1 Cal.5th 1, 15 (*Isaiah W.*).)

In this case, the evidence of American Indian ancestry consists of father's statements that (a) his aunt has said "there is Black Foot Indian in our family," (b) he believes he may have American Indian ancestry because his grandmother was born and raised in Nachez, Mississippi, and (c) family members speak about being "mixed with Indian." He also indicated several times that his aunt or sister had documentation regarding his American Indian ancestry, although he was never able to provide the documentation to the Department, despite multiple inquiries.

ICWA notice requirements are not triggered by the vague statement that a child "may" have American Indian ancestry because of where her great-grandmother was born and raised, or by family lore about being "mixed with Indian." (See *In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1469 ["family lore" is not "reason to know" a child falls under ICWA]; *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1521 [ICWA notice requirement not triggered where the father stated he might have some Indian heritage but did not mention the tribe name, then later told the Department and the court that he did not have any Indian heritage, and his counsel retracted the claim]; *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1200 ["[T]here are many instances in which vague or ambiguous information is provided regarding Indian heritage or association (e.g., 'I think my grandfather has some Indian blood'; 'My great-grandmother was born on an Indian reservation in New Mexico'). In these types of cases, . . . inquiry is necessary before any attempt at notice to a specific tribe even can be made"]; *In re O.K.* (2003) 106 Cal.App.4th 152, 157 [paternal grandmother's statement that the minor's father " 'may have Indian in him' " because "where were [sic] from is that section" deemed too vague and speculative to cause court to believe minor is an Indian child].)

However, in this case, father went beyond vague and speculative statements by informing the court that his aunt has stated that "there is Black Foot Indian in our family." In *Alice M., supra*, 161 Cal.App.4th 1189, the mother wrote, "American Indian, Navajo-Apache" in response to a form asking whether the child "is or may be a member of, or eligible for membership in, a federally recognized Indian tribe." (*Id.* at p. 1194.) The court held that this information "gave the court reason to know that Alice *may be* an Indian child. In completing the JV–130 form, appellant stated that Alice is or may be a member of, or eligible for membership in, an Apache and/or Navajo tribe. The ambiguity in the form and the omission of more detailed information, such as specific tribal affiliation or tribal roll number, do not negate appellant's stated belief that Alice may be a member of a tribe or eligible for membership." (*Id.* at p. 1198.)

Similarly, in *In re Damian C.* (2009) 178 Cal.App.4th 192 (*Damian C.*), mother filed a form indicating that the child's grandfather is descended from the Pasqua Yaqui. (*Id.* at p. 195.) When interviewed, the grandfather reported that he had heard his own father was Yaqui or Navajo Indian but had been later informed that the family did not have Indian heritage. (*Id.* at pp. 195.) His family tried to research their possible Indian heritage, but had been unsuccessful. (*Id.*, p. 199.) This information was "reason to know than an Indian child is or may be involved" and triggered ICWA notice requirements. (*Ibid.*)

Under *Alice M.* and *Damian C.*, father's statement that his family has Blackfeet heritage[3] was sufficient basis to find the child is, or may be, an Indian child. It is

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[3] Although father stated he had "Black Foot Indian" in the family, there is no "Black Foot" tribe listed in the Federal Registry. The tribe with the closest name is the Blackfeet tribe. (77 FR 45816, 45833.) "[T]here is frequently confusion between the Blackfeet tribe, which is federally recognized, and the related Blackfoot tribe which is found in Canada and thus not entitled to notice of dependency proceedings. When Blackfoot heritage is claimed, part of the [Department's] duty of inquiry is to clarify whether the parent is actually claiming Blackfoot or Blackfeet heritage so that it can discharge its additional duty to notice the relevant tribes." (*In re L.S., Jr.* (2014) 230 Cal.App.4th 1183, 1198.) The record does not indicate whether the Department attempted to clarify whether father had possible Blackfoot or Blackfeet heritage, and the

irrelevant that father was not certain of his American Indian heritage, or that he was unable to provide further information or documentation of his American Indian ancestry. (See, e.g., *Damian C.*, *supra*, 178 Cal.App.4th at p. 199 [ICWA notice required even though grandfather had heard conflicting information about whether his family had Pasqua Yaqui heritage and had been unsuccessful in researching the family's possible Indian heritage].)

Shane G., *supra*, 166 Cal.App.4th 1532 does not compel a different conclusion. In *Shane G.*, a relative informed the social worker that the child's great-great-great grandmother was a Comanche princess, although no one in the family had ever participated in Indian ceremonies, lived on a reservation, attended an Indian school, or received services from an Indian health clinic. (*Id.*, p. 1537.) In finding this information insufficient to trigger ICWA notice, the court noted that the "[m]ost significant[]" factor was the evidence in the record that the Comanche tribe requires at least one-eighth Comanche heritage for membership in the tribe. (*Id.*, pp. 1537, 1539.) The information before the court was that the child was 1/64th Comanche, and therefore could not have been a Comanche child. (*Id.*, p. 1537.)

Unlike *Shane G.*, there is no information in this case that would definitively exclude the child as a member of the Blackfeet Nation. That is a decision that rests with the Indian tribe itself. (*Desiree F.*, *supra*, 83 Cal.App.4th at p. 471.) For that reason, "[t]he Indian status of the child need not be certain to invoke the notice requirement." (*Ibid.*; *Isaiah W.*, *supra*, 1 Cal.5th at p. 15 ["[T]he relevant question is not whether the evidence . . . supports a finding that the minor[] [is an] Indian child[]; it is whether the evidence triggers the notice requirement of ICWA so that the tribes themselves may make that determination." [Citation].]) "[T]he [dependency] court needs only a

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Department does not argue that it is not required to provide ICWA notice because father claimed ancestry in a tribe not listed in the Federal Registry.

suggestion of Indian ancestry to trigger the notice requirement." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) [4]

We remand the matter for the Department to comply with ICWA's notice requirements. We do not reverse the order terminating mother's parental rights because there has not yet been a sufficient showing that ICWA substantive protections apply to the child. If a tribe later determines that the child is an Indian child, "the tribe, a parent, or [the child] may petition the court to invalidate an action of placement in foster care or termination of parental rights 'upon a showing that such action violated any provision of sections [1911, 1912, and 1913].' (25 U.S.C. § 1914.)" (*Damian C., supra*, 178 Cal.App.4th at p. 200.)

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[4] As the Department points out, the First District Court of Appeal found no duty to provide ICWA notice when a parent reported that one of her grandmothers "'was Cherokee' and another 'part Apache.'" (*In re Z.N.* (2009) 181 Cal.App.4th 282, 298 (*Z.N.*).) *Z.N.* reasoned the information was "scant and general" because "[w]hatever the status of the grandmothers, they were great-grandmothers of the [children], and this information did not suggest that the [children] were members or eligible for membership as children of a member." (*Ibid.*)

Recognizing the *Z.N.* holding relied in part on the application of harmless error, at least one appellate panel has discounted *Z.N.'s* evaluation of the great-grandmothers' information as dictum. (*In re B.H.* (2015) 241 Cal.App.4th 603, 608.) In any event, *Z.N.* did not support its assessment of the great-grandmothers' status with citation to any authority, and case law does not line up with the approach taken in *Z.N.* The suggestion that ICWA notice is, as a matter of law, not required if it is based solely on information connected to a child's great-grandparent is overbroad (see, e.g., *In re S.E.* (2013) 217 Cal.App.4th 610, 615-616 [*requiring* ICWA notice to include the known identity of a child's great-great-grandparent]) and inconsistent with the general rule that it is the exclusive province of the tribe to determine membership *(Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72 fn. 32; *In re Isaiah W., supra,* 1 Cal.5th at p. 8; *In re Jack C.* (2011) 192 Cal.App.4th 967, 980).

DISPOSITION

The case is remanded for the limited purpose of ensuring compliance with the ICWA's notice requirements. We need not reverse the termination of mother's parental rights.

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KUMAR J. *

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.